IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 658 of 1986
with
CRIMIAL APPEAL No.149 of 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
HARIHAR A DUBE & 2 - Opponent(s)

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Appearance :

Criminal Appeal No.658 of 1986
MR KT DAVE for Appellant(s) : 1,

MR KJ SHETHNA for Opponent(s) : 1 – 3.
Criminal Appeal No.149 of 1987
MR KJ SHETHNA for Appellant
MR KT DAVE for opponent
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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/10/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. Since both these appeals are filed against the very same judgment and order dated 18.3.1986 passed by the learned Additional Sessions Judge, Surat in Sessions Case No.8 of 1985 and since both these appeals are heard together, the same are being disposed of by this common judgment.

2. Criminal Appeal No.658 of 1986 is filed by the State of Gujarat under Section-378 of the Criminal Procedure Code against the acquittal

of the respondents Nos.1 to 3 - original accused Nos.1 to 3 from the offences punishable under Sections-302 read with Section-34 and 109 of the I.P.C.

3. Criminal Appeal No.149 of 1987 is filed by the appellants Nos.1 to 3 / original accused Nos.1 to 3 against the order and judgment dated 18.3.1986 of the learned Additional Sessions Judge convicting the appellants under Section-304 Part-II read with Section-34 of the I.P.C and sentencing them to suffer R.I of 3 years and six months and to pay fine of Rs.5500/- each and in default thereof to undergo R.I for 1 year.

4. Appeal filed by the State of Gujarat was admitted on 12.11.1986 whereas appeal filed by the accused Nos.1 to 3 was admitted on 15.7.1987 and each of the appellants was ordered to be released on bail of Rs.5000/- each with one surety of like amount with the

stipulation that the surety shall be in each case a resident of local limits of Surat district.

5. During the pendency of these appeals, the appellant / original accused No.2 i.e Nirankar Dube expired in the month of August, 1999. The appeal qua the appellant No.2 in Criminal Appeal No.149 of 1987 and qua respondent No.2 in Criminal Appeal No.658 of 1986 stood abetted.

6. The brief facts giving rise to both these appeals are as under :-

7. The case of the prosecution was that on 4.9.1984 at about 6:40 a.m in the morning the deceased Hanumansinh and the complainant Harish, son of the deceased were going on their scooter towards Baroda Rayon Corporation, Surat. During that time one bullet on which the accused Nos.1 to 3 were

sitting had come from the opposite side and dashed with the scooter of the deceased. The deceased Hanumansinh and the complainant - Harish both fell down, as a result of dashing of bullet with the scooter and when the deceased Hanumansinh was trying to stand up the bullet was kept aside by the persons sitting on the bullet and Mr.Harihar Ambikaprasad – appellant No.1 has given a blow of stick on the head of the deceased Hanumansinh and, thereafter, Omkarnath Ambikaprasad – appellant-accused No.3 had tied down the deceased Hanumansinh and pressed his hands and legs and, thereafter, Nirankar Shivsagar Dube, the appellant-accused No.2 have given frequent blows of knife to the deceased Hanumansinh. The blood has come out from the body of the deceased. During this period Constable – Pandurang has come at the place of offence and he had tried to get released the deceased Hanumansinh from the clutches of the accused. In this process

he has also got some injuries. Thereafter, the relatives of deceased Hanumansinh had come at the place of offence and hence the appellants-accused have run away leaving behind their bullet there. Deceased Hanumansinh was taken to the Civil Hospital in rickshaw and on his way to Civil Hospital in the rickshaw itself he succumbed to the injuries and died.

8. The complainant-Harish thereafter lodged a complaint in Udhna Police Station and PSI – Mr.Parmar has registered the complaint of complainant – Harish. The PSI has gone to the place of offence and immediately thereafter PSI Jayeshwal has reached to the place of the offence and took charge of the investigation. The panchnama of scene of offence was drawn and also inquest panchnama of the body of deceased Hanumansih was drawn. The statement of the witnesses were recorded and, thereafter, the investigation was handed

over to PSI – Mr.Pandya. The accused were arrested from Mumbai. Accused No.1 - Harihar Ambikaprasad has produced blooded clothes, whereas accused No.2 - Nirankar Shivsagar Dube has produced the knife. Thereafter accused No.4 Ayodhyaprasad Jagdishprasad who was the owner of the bullet was also arrested. The muddamal articles were sent to Forensic Science Laboratory and after collecting the evidence, charge-sheet was filed in the Court of concerned Magistrate against the accused Nos.1 to 4 for committing the offence punishable under Section-302 read with Section-34 and 109 of I.P.C. Since the case was exclusively triable to the Sessions Court, the same was committed to the learned Sessions Court by the learned Magistrate. The learned Sessions Judge has framed the charge against the accused Nos.1 to 4 on 18.4.1985 for an offence committed under Section-302 read with Section-34 and 109 of I.P.C.

9. To prove culpability of the accused, prosecution has in all examined 27 witnesses. Prosecution has also produced as many as 25 documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Surat explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement, the accused had denied the case of the prosecution by reiterating that they have been falsely implicated.

10. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Surat has held that the prosecution has established beyond reasonable doubt that

the charge under Section-304 Part II and not under Section-302 of IPC against the accused Nos.1 to 3 was proved and, therefore, the accused Nos.1 to 3 were held guilty of the offence punishable under Section-304 Part-II read with Section-34 of I.P.C. The learned Additional Sessions Judge, Surat has, however, acquitted accused No.4 from the charge levelled against him. Thereafter, learned Additional Sessions Judge, Surat heard the accused and their advocate on sentence. Looking to the gravity of the offence committed by the accused and looking to the circumstances, original accused Nos.1 to 3 were sentenced to suffer R.I of 3 years and six months and fine of Rs.5500/- each and in default thereof, each one to undergo the R.I of 1 year.

11. Being aggrieved by the said order and judgment of the learned Additional Sessions Judge, Surat, the State of Gujarat has filed

Criminal Appeal No.658 of 1986 against the order of acquittal of the accused Nos.1 to 3 from the charges levelled against them under Section-302 of I.P.C. Similarly, accused Nos.1 to 3 have also filed Criminal Appeal No.149 of 1987 against the order of conviction under Section-304 Part-II and sentence of R.I of 3 years and six months with fine of Rs.5500/- each and in default thereof, each one to undergo the R.I of 1 year.

12.This is how both these appeals have come up for hearing before this Court.

13.Mr.K.T.Dave, learned Additional Public Prosecutor, appearing for the State of Gujarat has submitted that the learned Additional Sessions Judge, Surat has erred in acquitting the accused from the charge under Section-302 read with Section-34 of I.P.C though there was ample and cogent evidence

against the respondent accused to prove this charge. He has further submitted that the learned trial Judge has erred in holding that there was a sudden and free fight between the parties. He has further submitted that the learned trial Judge has wrongly held that the offence committed by the accused was not under Section-302 read with Section-34 of I.P.C. He has further submitted that the learned trial Judge should have appreciated that the accused No.1 has dashed his bullet with the scooter of the deceased and the deceased as well as complainant fell down and then the respondents accused assaulted the deceased. The accused No.1 gave stick blow on head. The accused No.3 caught hold of the deceased and accused NO.2 gave knife blows to the deceased. On these facts the learned trial Judge ought to have appreciated that there was no provocation caused by the deceased or complainant. He has further submitted that there was no question of

sudden fight between the accused and the deceased as well as the complainant. The whole incident happened because of the deliberate dashing of the bullet by the accused No.1 with the scooter driven by the deceased so the conclusion arrived at by the learned trial Judge that the incident has happened due to sudden fight between the parties, is not warranted from the evidence on record. He has further submitted that the accused No.1 had deliberately dashed his bullet with the scooter of the deceased with the intention of assaulting him with fetal injuries and even after the deceased fell down the accused No.1 gave stick blows to the deceased. He has submitted that the reasons given by the leaned trial Judge while acquitting the accused from the charge of murder are perverse and not borne out from the facts of the case. He has, therefore, submitted that the learned trial Judge should have convicted all the 3 accused for the

offence punishable under Section-302 read with Section-34 of the I.P.C.

14.Mr.K.J.Sethna, learned advocate appearing for the accused has submitted that by judgment and order dated 18.3.1986 the learned Additional Sessions Judge, Surat acquitted the accused No.4 of all the charges. He has convicted the accused Nos.1 to 3 under Section-304 Part-II and sentenced each one of them to suffer 3 years and six months R.I and to pay fine of Rs.5500/- each and in default to undergo R.I for 1 year. The amount of fine was paid by the accused on the same day. From the total amount of Rs.16,500/- of fine paid by the accused, the trial Court directed that Rs.15,000/- be given jointly to widow and son of the deceased. The trial Court acquitted the accused from the charge under Section-302 read with Section-34 and 109 of I.P.C.

15. Mr.Shethna has further submitted that the trial Court has wrongly convicted the accused under Section-304 Part-II of I.P.C and there was no cogent clear or unequivocal evidence led by the prosecution during the course of trial so as to establish the link of the accused with commission of offence. He has further submitted that the accused No.4 was acquitted by the learned Additional Sessions Judge and accused No.2 expired during the pendency of the appeal. The major blow of knife was stated to have been made by the accused No.2 – who is no more now. The only charge against the accused No.1 is infliction of stick blow on the head of the deceased and against the accused No.3 is that he has caught hold of the deceased. The fact regarding exchange of words and free fight was admitted and there was ample evidence led during the course of trial which had established beyond any reasonable doubt that there was no case of pre plan or motivated

action on the part of the accused. Considering all these circumstances there is no case of convicting the accused Nos.1 & 3 under Section-302 read with Section-34 of IPC and they are also required to be acquitted from the charge under Section-304 Part-II of I.P.C.

16. Mr.Shethna, has alternatively submitted that the accused Nos.1 to 3 were arrested on 7th, 18th and 27th September, 1984 respectively. Accused No.1 was released on bail after the expiry of 90 days from the date of his arrest as the charge-sheet was not submitted within the stipulated time under Section-157 of the Code. He remained enlarged on bail till 18th March, 1986 on which date the judgment and order of conviction and sentence was pronounced against him. Accused Nos.2 and 3 were not enlarged on bail. Considering the period undergone by them as the 'under trial

prisoners' as the set-off under Section-428 of the Code and the other benefits available to them, very little period of sentence is to be served out by them. Even so far as the case of accused No.1 who was enlarged on bail pending trial was concerned, there would be a difference of about 15 months in serving out his sentence. He has, therefore, submitted that even if this Court is not inclined to upturn the conviction, the sentence awarded may be reduced to the sentence undergone by the accused Nos.1 and 3.

17. We have considered the submissions advanced by Mr.K.J.Shethna, learned advocate appearing for the original accused Nos.1 to 3 and Mr.K.T.Dave, learned Additional Public Prosecutor, appearing for the State of Gujarat in both these appeals at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire

evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional Sessions Judge, Surat in Sessions Case No.8/1985 convicting the accused under Section-304 Part-II of I.P.C and sentencing them for the R.I of 3 years and six months and fine of Rs.5500/- each and in default thereof to undergo further R.I of 1 year.

18. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Additional Sessions Judge, Surat has recorded just and correct conclusion holding the accused guilty, we may first advert to the oral testimony of the prosecution witnesses.

19. P.W. No.5 Kripashankar Ramshankar Ex.37, in his deposition has inter alia stated that on the date of incident i.e. 4.9.1984 when he was sitting at his shop, at about 6:30 a.m. Shri Harihar, Omkar and Nirankar have come on bullet and the bullet was parked at the gate of Baroda Rayon. It appeared to him that they were waiting for somebody. He has further deposed that at about 6:45 a.m deceased Hanumansinh alongwith his son Harish had come on scooter and on seeing Hanumansinh the accused has started their bullet. The bullet was driven by Harihar and Omkar was sitting behind him and, thereafter, Nirankar was sitting on the bullet. The accused thereafter have dashed their bullet with the scooter and deceased Hanumansinh and his son had fallen down. Harihar has taken out stick from the bullet and gave a blow of stick on the head of the deceased Hanumansinh. The deceased Hanumansinh tried to stand up, however, accused Omkar has caught hold of the

deceased and, thereafter, accused Nirankar had taken out knife and three to four knife blows were inflicted on deceased Hanumansinh. The knife blows were inflicted on the legs as well as on thigh. The son – Harish shouted for help and hence police-man has immediately rushed there from the police chowki. The accused Harihar has also given stick blow to the police-man. This witness in his cross-examination has stated that when the bullet has dashed with the scooter his attention was drawn towards that incident. After the scooter and motor-cycle were dashed there was exchange of words between the deceased Hanumansinh and the accused. He has further stated in his cross-examination that the scooter and motor-cycle were dashed on kachcha road and both the vehicles were tumbled down on kachcha road. He has also stated that after the exchange of words there was free fight and quarrel between them. He has further stated that a day prior to the

date of incident there was rain and the sands were wet. Certain contradictions were pointed out by the defence counsel on the basis of police statement as well as evidence given by this accused before the Court. It has also come in the evidence of this witness that there were many cases against deceased Hanumansinh and in the case of B.D.Patil, the deceased Hanumansinh was also convicted and awarded sentence.

20. P.W. No.7 – Ramchandra Ex.40, was a watchman, and was on duty at the gate of Baroda Rayon and his duty period was from 6:00 a.m to 2:30 p.m. He has stated in his examination in chief that he was not aware about such incident. This witness turned hostile and in his cross-examination he has denied that he has seen the accused on that day on motor-cycle and that deceased Hanumansinh was given stick and knife blows by the accused.

21. P.W. No.8 Bhavanicharan Ex.45, who was also a watchman and was on duty on the date of incident at the main gate of Baroda Rayon and his duty period was from 6:30 a.m to 2:30 p.m. This witness has also turned hostile.

22. P.W No.9 Munindraprasad Ex.42 has supported the case of the prosecution. It has come on record from his evidence that earlier he was working in the firm of M/s.Mohanlal & Sons, Pandesara and there was quarrel between the workers and the owner of that firm was killed and a criminal case was registered against him wherein he was acquitted.

23. P.W. No.10 Kishor Ganpatrai Bhatt 43, is a panch witness of the recovery panchnama. P.W. No.12 – Ramdas Govind Ex.48, has supported the case of the prosecution and admitted the fact regarding recovery of knife at the behest of the accused No.2.

24. PW-26 Mr.Jayswal is the Police Inspector at Udhna Police Station. He reached to the scene of offence where Police Inspector Mr.Parmar was present. He took charge of the investigation. However, it was handed over to Police Inspector, Mr.Pandya subsequently. He admitted in his chief examination that Mr.Phulchand, the brother of accused No.1 and 3 filed N.C.Complaint against the deceased on 2.9.1984. It is also revealed from his cross-examination that a complaint was filed against him in the Court of Chief Judicial Magistrate, but he did not remember as to who has filed the said complaint. He also did not remember that he has beaten Phulchand, Harihar and Omkar and asked for the bribe of Rs.1000/- from them.

25. P.W. No.20 – Harishkumar Ex.79, is the son of deceased Hanumansinh. He was accompanying the deceased on the scooter on the date of

incident. He has stated in his deposition that his father was a social worker and also a member of Choriyashi Taluka Panchayat. He has further stated that Harihar, Nirankar and Omkar were doing the work of dying and printing contract. People used to come to take advise of his father. He has further stated that on 2.9.1984 at about 7:00 to 7:30 p.m he has gone to attend to the Ganesh festival in the premises of Baroda Rayon. At that time the accused – Harihar's brother Phulchand was on duty. He stopped him and told him not to pass through main gate. He also told him to convey his father that he would also meet with the same fate as the three Brahmins were beaten earlier. He has further deposed that he conveyed this message to his father and at that time his father has taken him to BRC gate and asked Phulchand not to quarrel with his son and whatever he wished to say he should say directly to him. He has further deposed that this incident

took place on 2.9.1984. His cross-examination reveals so many contradictions between his statement before the police and his deposition before the Court. He has admitted in his cross-examination that his father was arrested in B.D.Patil's case. However, he was not aware as to whether he was convicted in that case or not.

26. It has come on record that the accused No.2 has filed Misc. Criminal Application No.21 of 1983 against Police Inspector – Mr.Jayaswal on 7.4.1983 in the Court of Chief Judicial Magistrate, Surat. This P.I. Mr.Jayaswal was in charge of the investigation initially. Accused Nos.1, 3 and their brother were mishandled. They were abused. It is only because Mr.Jayaswal has implicated accused in this case and since they were arrested, the case against Mr.Jayaswal was dismissed for want of prosecution. The accused in their further written statement have stated that in

the scuffle, the accused Nos.1 and 2 were also injured but the police has not made any investigation in this regard.

27. It has also come on record that the State of Gujarat has filed appeal against deceased Hanumansinh, who was accused No.2 in Sessions Case No.94 of 1978 and charge against him alongwith others was commission of offence punishable under Section-302 read with Section-149 of I.P.C and 135 of the Bombay Police Act. While reversing the order passed by the learned Sessions Judge, this Court vide its order and judgment dated 27/28.11.1979 in Criminal Appeal No.1235 of 1978 held the deceased Hanumansinh guilty of committing an offence under Section-326 read with Section-34 of I.P.C and directed to suffer R.I for 5 years. The cumulative effect of these evidence brought on record by the defence, leads the Court to believe that there might be an exaggeration in involving

the accused in the commission of offence.

28. From the evidence led by the prosecution, the evidence of three eye witnesses is reliable and trustworthy. It clearly indicates that the bullet and scooter were dashed near BRC Gate and were crumbled down. The deceased Hanumansinh who was driving the scooter was fallen down and he was beaten up by the accused. He got injury on his head, legs and thighs and because of head injury he died. These facts are corroborated by the medical evidence. PW-4 Dr.Mohammad Iqbalhusain Kureshi in his deposition has stated that because of multiple fractures in head, there was heavy bleeding and severe shock and suffering and hence he died. From the evidence of PW–5 Kripashankar, PW-9 Munindraprasad and PW-20 Harishkumar, who are the eye witnesses, prosecution has proved that Harihar Ambikaprasad has given stick blow on the head of deceased. Omkarnath has

caught hold of him when he was lying and Nirankar Shivsagar has given knife blows on his legs and thighs. Thus all the three accused have helped each other in causing injuries to the deceased. However, from this evidence, it is difficult to prove that the accused had an intention to kill the deceased. It has not been proved that the accused had come together with common intention to kill the deceased. None of the witnesses has proved that the accused persons had come to the scene of occurrence with an intention to commit the murder of the deceased. From the evidence of PW-20 Harishkumar it is proved that there was enmity between the accused and the deceased and on the previous day, the deceased had a hot exchange of words with Phulchand Ambikaprasad. However, on these facts, it is difficult to prove that the common intention to kill the deceased arose on the date of incident. What can be generally believed and

understand is that because of dashing of the bullet with the scooter, there was a hot exchange of words and free fighting amongst them and due to sudden provocation on the spur of moment, the deceased was beaten up and he died. The learned trial Judge has therefore rightly held that the accused are liable to be convicted under Part II of Section-304 and not under Part I thereof or under Section-302 of IPC.

29. We, now, turn to discuss the relevant case law on the subject.

In the case of **Mohinder Pal Jolly vs. State of Punjab, reported in (1979)3 Supreme Court Cases 30**, a question arose before the Hon'ble Supreme Court as to whether the appellant was guilty in Part-I of Section-304 or Part-II. It was discussed in the said judgment that if the accused commits an act while exceeding the right of private defence

by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part-I. On the other hand if before the application of any of the Exceptions of Section-300 it is found that he was guilty of murder within the meaning of clause '4thly' then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, the Court held that the appellant could be convicted only under Part-II of Section-304 and not Part-I. The Court further held that sentence of three years' rigorous imprisonment would meet the ends of justice. The Court has also taken

into consideration that the appellant was in jail for about nine months as an under trial prisoner and for about four months after conviction. Thus he has already undergone imprisonment for a period of about a year and a month. The occurrence took place more than a decade ago. The appellant had to pass this long ordeal all these years both mentally and financially. Considering the totality of the circumstances while maintaining the imposition of fine of Rs.10,000/- and in default two years' further imprisonment, the Court reduced substantive term of imprisonment to the period already undergone and maintained the conviction of the appellant not under Part-I of Section-304 of the Penal Code but under Part-II thereof.

30. In the case of **Hari Ram V/s. State of Haryana, AIR 1983 S.C. 185** in the heat of altercation between the deceased on one hand and the accused on the other, the accused

seized a jelli and thrust it into the chest of the deceased and it was preceded by his remark that the deceased must be beaten to make him behave and only one blow was struck by the accused at the deceased, it was held that on the evidence it does not appear that there was any intention to kill the deceased and therefore the conviction under Section 302 cannot be sustained and that, on the contrary, the facts make out an offence under the second part of S. 304 of IPC.

31. In the case of **Jawahar Lal and another vs. State of Punjab, reported in AIR 1983 Supreme Court 284**, the accused, the immature boy aged about 19 years, in the background of the trivial quarrel, with “A” had given a solitary blow of knife to the deceased which fell on his chest. The accused had no malice against the deceased. He had no quarrel with the deceased and the accused did not make any attempt at giving second blow in the dim

light available at the time of occurrence. The accused could not be said to have intention to cause that particular injury. Even if the injury proved to be fatal, the case would not be covered by Sec.300, Para 3. However, since the accused could be attributed the knowledge that he was likely to cause an injury which was likely to cause death, the accused could be convicted under Sec.304, Part II and not under S.302.

32. In the case of **Tholan vs. State of Tamil Nadu, reported in AIR 1984 Supreme Court 759**, the accused started demonstrations using filthy language against certain organisers of a chit fund who had no connection with the deceased, in front of the house of the deceased and the deceased came out of his house and asked the accused to go away. The accused on spur of moment gave only one blow with knife to the deceased and pushed him to some distance. It was held in the

circumstances of the case that, though requisite intention to commit murder could not be attributed to the accused he wielded a weapon like a knife and therefore, he could be attributed with knowledge that he was likely to cause an injury which was likely to "cause death". In such a situation though he could not be convicted under S.302, he would be guilty of committing an offence under S.304 Part II.

33. In the case of **K.Ramakrishnan Unnithan vs. State of Kerala, reported in (1999)3 Supreme Court Cases 309,** the incident was of the year 1985 and more than 13 years have elapsed when the Hon'ble Supreme Court has decided the said case. The accused was on bail pursuant to the orders of the Hon'ble Supreme Court and has already undergone sentence of about four years. In such circumstances, the Hon'ble Supreme Court has held that for his conviction under Section-304 Part-II IPC, he

was liable to be sentenced to the period already undergone. The conviction under Section-324 IPC remained unaltered but no separate sentence was being awarded.

34. In the case of **Chavda Jivanji Chelaji and others vs. State of Gujarat, reported in (2002) 9 Supreme Court Cases 576**, the Hon'ble Supreme Court was concerned with the case where the accused persons, some armed with dharia (a stick with a sickle-shaped metal fitted at the top) and some armed with stick have assaulted the deceased. Only one incised head injury was inflicted on the left humerus which had cut artery and vein causing the death of the deceased. Deceased was surrounded by the accused and was sometimes standing up and at other times running while accused were assaulting him. In these circumstance, the Hon'ble Supreme Court has held that it cannot be said that the particular injury on the humerus was

specifically intended by the assailant at whose hand that injury was caused. The Hon'ble Supreme Court has, therefore, held that the offence could not fall within the purview of cl. thirdly of S.300 and altered the conviction from S.302 r/w S.149 to S.304 Pt.II of IPC. It was further held that such conviction can be fastened only with those accused who were armed with dharia. They have to be sentenced to five years' RI. They have also to be convicted under S.447 and sentenced to 6 months' RI. Other accused can only be convicted under S.447, and they were sentenced to 6 months' RI.

In the present case, the accused No.1 was having a stick and he gave stick blow on the head of the deceased. The accused No.3 has merely caught hold of deceased and the accused No.2 who expired, gave knife blows. Thus, accused No.1 and 3 could not have been sentenced to three and half years.

35. In the case of **State of M.P. vs. Harilal, reported in (2002) 10 Supreme Court Cases 321**, the Hon'ble Supreme Court has taken note of the fact that the High Court was extremely brief while discussing the evidence against the respondents and had hardly given any reason for reducing the sentence from Section-302 to Section-304 Part II IPC. The Court further consider the fact that the incident in question had taken place as far back as on 11.10.1982 and from the records it was found that by the time the High Court delivered its judgment, all the respondents had served more than 9 years of RI and even those appeals before the Hon'ble Supreme Court were filed in the year 1995. Under these circumstances, the Hon'ble Supreme Court has thought it not equitable to entertain the argument of learned counsel for the State to upturn the judgment of the High

Court even if it is assumed that the same was erroneous. The Court has further held that substantial justice has been done.

36. In the case of **Ramu vs. State of U.P, reported in (2004) 12 Supreme Court Cases 250**, while partly allowing the appeal preferred by the accused, the Hon'ble Supreme Court has held that the High Court rightly held that the appellant did not have any motive whatsoever to cause any fatal injury to the deceased. The High Court was also right in holding that the injury in question was caused during a melee in which six persons took part. Hence, on the facts and circumstances of this case, the act of the appellant in causing injury to the deceased which led to his death, cannot be the one which could be construed even as an act of culpable homicide not amounting to murder. The act of the appellant is one of causing grievous hurt with a deadly weapon which is

punishable under Section-326 IPC. The Court further held after noticing the fact that the incident in question had occurred as far back as in 1978 and the appellant had no enmity against the deceased nor any motive to cause a fatal injury and hence the ends of justice would be met if the appellant's conviction is altered to one under Section-326 IPC and a sentence of three years' RI is awarded for the said offence.

37. In the case of **Saravanan and another vs. State of Pondicherry, reported in 2005 Supreme Court Cases (Cri) 161**, while deceased and PWs 1 and 2 were going on their cycles, appellants (A-3 and A-4) came on cycle and dashed and abused PW 1 but PWs and deceased ignored the same and proceeded further but appellants chased them and picked up quarrel again and assaulted the PWs and A-1 who joined them and caused violence and injuries to deceased as a result of which deceased

fell down on road with his face upwards and sustained bleeding injuries on back side of his head due to which he ultimately died. The accused 1, 3 and 4 were convicted by the trial Court for an offence punishable under Section-304 Part II read with Section 34 IPC and were sentenced of 2 years RI. The Hon'ble Supreme Court has held that by applying Section-34 IPC and convicting the appellants for an offence under Section-304 Part II read with Section 34 IPC, no error of law has been committed either by the trial Court or by the High Court.

38. From, the foregoing facts and discussion and the case law referred to above, the Court is of the view that the prosecution has not satisfactorily proved the case against the appellants-accused for convicting them under Section-302 or Section-304 Part I of IPC. The learned trial Judge has come to the just and proper conclusion in acquitting the

appellants-accused from the charge of Section-302 of IPC and convicting them under Section-304 Part II of IPC. There is no reason for this Court to interfere with the finding arrived at by the learned trial Judge after proper appreciation of all the oral as well as documentary evidence. The appellants-accused are therefore rightly acquitted by the learned trial Judge from the charge levelled against them under Section-302 of IPC. The reasons recorded by the learned Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas v. State of Haryana, reported in (2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kanshiram v. State of Madhya Pradesh**

(Re.Para-21), reported in AIR 2001 SC 2902, in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse.

39. In the case of **Budhsingh & another vs. State of U.P, reported in AIR 2006 Supreme Court 2500**, the Honourable Supreme Court has held that it is established principle of law that the High Court does not ordinarily set aside the judgment of acquittal in a case where two views are possible although the view of the appellate Court is a more probable one.

40. After having held that the conviction recorded against both the accused has to be confirmed and maintained, the next question

which calls for determination of this Court is as to what sentence should be imposed upon them.

41. So far as all the three accused are concerned, they were convicted for the offence punishable under Sections-304 Part II, of IPC and the trial Court has imposed the RI of three and half years and fine of Rs.5500/- each and in default thereof to undergo RI of one year more.

42. It is true that the incident had taken place on 4.9.1984 and more than 22 years have passed. The accused No.1 and 3 have undergone the sentence of about two and three years respectively. They are not the main assailants. The main assailant, accused No.2 expired during pendency of these appeals. So far as offence punishable under Section-304 Part II of IPC is concerned, the Hon'ble Supreme Court in catena of decisions has

imposed sentence varying from 2 to 5 years. Therefore, according to us, the sentence is required to be altered to the sentence undergone by each of the remaining two accused.

43. In aforesaid state of affairs, according to us, long period that has rolled by since the committing of the offence in question and the mitigating circumstance which have been highlighted in the foregoing paragraphs, the accused Nos.1 and 3 deserve sympathetic consideration and in the present case the sentences imposed upon them are required to be altered while maintaining the conviction.

44. Since in the present case the appellants-accused were awarded the sentence of 3 years and six months with fine of Rs.5500/- each, which has already been paid, and since the appellant No.3 has almost undergone the sentence of more than 3 years, both by way of

under trial prisoner as well as conviction and the accused No.1 has undergone the half of the said sentence and since the occurrence took place more than two decades ago and since the appellants had to pass through the long ordeal all these years both mentally and financially, we are of the view that while maintaining the imposition of fine of Rs.5500/- each, we reduce the substantive term of imprisonment to the period already undergone and maintain the conviction of the appellants not under Section-302 or under Part-I of Section-304 of the Penal Code but under Part-II of Section-304.

45. We are, therefore, of the view that the appeals filed by the State of Gujarat deserves to be dismissed and the appeal filed by the accused deserves to be partly allowed qua sentence only. The impugned judgment and order convicting both the accused for offence under Section-304 Part II is accordingly

confirmed and maintained. So far as sentence is concerned, the same deserves to be altered as the sentence undergone by each of these two accused. Bail bonds and sureties furnished by them stand cancelled.

46. In this view of the matter, both the appeals are disposed of accordingly.

(C. K. BUCH, J.) (K.A. PUJ, J.)

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